No. 85-1499

Supreme Court, U.S.
FILED
MAY [illegible]
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1986

LANDAHL, BROWN & WEED ASSOCIATES, INC.
Petitioner

v.

CITY OF CAPE CORAL
Respondent

WRIT OF PETITION OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EDWARD DEV. BUNN
P.O. Box 1034
Bailey's Crossroads
Virginia 22041
(703) 684-2500

Attorney for Petitioner

REPLY ARGUMENT

The City of Cape Coral misleads the Court with its argument that the writ of certiorari should not issue because petitioner did not raise the Federal issues in the Florida appellate courts and they were not tried in the Florida trial court, although they were alleged in the complaint.

LIST OF PARTIES AND AFFILIATES

A list of all parties to this proceeding are contained in the caption.

Landahl, Brown & Weed Associates, Inc. is not and has no parent subsidiary or affiliated company or organization.

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ARGUMENT

As the City[1] conceded, the issues raised here by Landahl[2] were alle d in the complaint filed in the trial court. The City is incorrect in stating that the issues were not tried in the Florida trial court. The Federal issues and the right to the recovery of money damages were specifically tried in the trial court. The City raised the following grounds by motion to dismiss the complaint on two separate occasions in the trial court:

> 2. That the court abate this action for lack of jurisdiction of subject matter because the alleged acts are judicial, quasi-judicial, legislative or quasi-legislative in nature and are immune under the doctrine of sovereign immunity.
>
> 3. That the court dismiss the third party plaintiff's complaint Count III, IV, V, VI and VII for failure to state a cause of action upon which relief may be granted.
>
> * * *
>
> 5. The that court dismiss Count II in that it contains no allegations of ultimate fact and that it contains three separate causes of action, i.e., denial of due process, taking of property without just compensation, and interference with the right to contract.
>
> * * *
>
> 7. That the court dismiss Count IV in that a municipality is not a person and cannot be guilty of violating the federal law listed in the allegation.
>
> 8 That the court dismiss Count V in that the conduct described is beyond the scope of the office and that the municipality has immunity.

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1. "City" as used herein refers to the "City of Cape Coral", respondent.

2. "Landahl" as used herein refers to "Landahl, Brown & Weed Associates, Inc.", petitioner.

On each occasion, the trial court considered and denied these grounds to dismiss the case. The first motion was denied on February 2, 1978 and the second motion on the same grounds was denied by a new judge in the case November 11, 1981.

After consideration by the trial court of the issues raised in this Court, the case went to trial with jury instructions that Landahl was entitled to recover money damages, if the jury should find that the City wrongfully prevented Landahl from engaging in construction in accordance with the building permits previously issued to it by the City under the old building code.

The jury returned a verdict of money damages against the City and in favor of Landahl, and the City appealed to the Second District Court of Appeal of Florida.

It is important to note that Landahl would not have raised the Federal issues on appeal as it was successful below, and was only concerned with defending the issues raised by the City on appeal. Furthermore, the City did not raise the Federal issue or the recovery of money damages, but instead appealed only on procedural grounds centered essentially around the right of Landahl to recover based upon a third party action, rather than via an original complaint. The City obviously was convinced by Landahl's agruments that it was entitled to recover money damages on constitutional grounds.

The Second District Court of Appeals of Florida raised, *sua sponte,* the right of Landahl to recover money damages. Landahl was not given notice of or an opportunity to brief or argue the issues raised, *supa sponte*, by the Second District appeal court, prior to the ruling. Landahl was caught totally by suprise. The issue raised, *sua sponte*, and ruled upon by the Court was that there was no right to recover money damages for revocation of building permits in any situation. The ruling was based upon a yet unpublished opinion decided, one month earlier, on April 4, 1985, by the Florida Supreme Court. *Trianon Park Condominium Asso., Inc.* v. *City of Hialeah*, No. 63,115 (Fla. April 4, 1985). The Landahl decision was rendered May 8, 1985. More than one-half of the 15 days allowed for a motion for rehearing

was expended by Landahl attempting to obtain a copy of the *Trianon Park* case. Six days alone were utilized by mail in transit—three days for the Landahl decision to be received and three days for a copy of the *Trianon Park* case to be received. The short remaining time was consumed with research of the new law under the *Trianon Park* decision and with research on related and associated cases. Certainly, if Landahl was to have any chance of success in its motion for reconsideration, it perforce was required to meet head-on the basis of the ruling of the Second District. Landahl did not have the luxury of choosing issues, but was required to meet the issues selected by the Second District. It would have been precious folly for Landahl to have skirted the *sua sponte* issues of the Second District, or to assert new issues foreign at that point to the case, in the motion for rehearing. The *Trianon Park* case does not deal with the Federal issues raised in this Court.

Landahl did file an appeal to the Florida Supreme Court. However, the jurisdiction of that Court is entirely discretionary and the procedure is that jurisdiction is decided before any issue on the merits is raised. It is misleading for the City to argue that Landahl did not raise the Federal issues in the Florida Supreme Court that have been raised in this Court, as Landahl never got beyond the jurisdictional point in the appeal. The Appendix to the City's Opposition Brief contains the Landahl Brief on Jurisdiction filed with the Florida Supreme Court, and the City utilizes that Brief incorrectly to suggest that the Federal issues should have been, but were not, raised below. The Florida Supreme Court by a two to one vote declined to accept jurisdiction. Landahl was required to get past the jurisdictional issue before it could raise the issues on the merits. The Landahl brief filed with the Florida Supreme Court was only a jurisdictional brief, and had absolutely nothing to do with the merits of the case or the issues to be raised on appeal. The Florida Rules of Appellate Procedure, Rule 9.120(d), provides:

> Petitioner's brief, limited solely to the issue of the Supreme Court's jurisdiction...shall be served within 10 days of the filing of the notice...

Rule 9.210(a)(5), Florida Rules of Appellate Procedure, provides that "Briefs on jurisdiction shall not exceed 10 pages." The 10 days and 10 pages point out the limited nature of the jurisdictional brief and the issues to be raised.

The applicable rule is that where the successful party in the trial court is defeated in the intermediate appellate level the higher appellate court may hear the appeal and rule on issues not raised in the intermediate appellate level, as the victorious party in the trial court had no opportunity to raise the issues at the intermediate appeal level. See *Maxcy-Barton Organ Co.* v. *Glen Bldg. Corp.*, 355 Ill. 228, 189 N.E. 326 (1934); cf. *Rothschild* v. *Knight*, 184 U.S. 573 (1901). Landahl, being victorious in the trial court, and having never passed the jurisdictional discretionary test in the Florida Supreme Court, had no opportunity to raise, after the trial court, the Federal issues.

This Court has recently recognized the historical flexibility of the Court in favor of deciding relevant issues raised in this Court where the objection is asserted that the issues were not, under various circumstances, raised below. *Capital Cities Cable, Inc,* v. *Crisp*, 467 U.S. _____ (April 16, 1984). See *Youakim* v. *Miller*, 425 U.S. 231 (1967); *Blonder-Tongue Labs.* v. *University Foundation*, 402 U.S. 313 (1971); *Pollard* v. *United States*, 352 U.S. 354 (1957).

The issues raised by Landahl in this Court were properly and adequately raised below. The argument of the City to the contrary is misleading and incorrect. It is submitted that Landahl did not have the "real" opportunity nor the requirement to raise different issues at the intermediate appellate levels.

Edward DeV. Bunn
P.O. Box 1034
Bailey's Crossroads
Virginia 22041
703-684-2500
Attorney for Petitioner